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IN THE

Supreme Court of the United States

October Term, 1949

No. 61

JOHN HUGHES AND LOUIS RICHARDSON,
PETITIONERS,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF THE NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*.

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Statement of Interest of the National Association for the Advancement of Colored People.

The National Association for the Advancement of Colored People is an organization which for the past forty years has devoted its efforts and energies toward the improvement of conditions affecting Negroes in the United States and throughout the world. It has worked unceasingly towards the eradication of racial discrimination which has kept the Negro from obtaining full citizenship.

One of the main factors which has kept the Negro in a status of unequality, is the wholesale discrimination in the economic field which has severely limited his opportunities to earn a decent livelihood. The National Association for

the Advancement of Colored People has consistently sought to eliminate these practices and has been in the forefront of the fight for state and federal fair employment practice legislation.

Although we are opposed to what has been alleged to be the ultimate objective of the petitioners in this action—proportional or quota hiring of Negroes—we believe that the controlling and primary issue here is whether the right to peacefully picket in order to improve the economic opportunities for Negroes is a right which has the protection of the Federal Constitution. This, we submit, is the basic issue which this case presents, and it is for this reason that we are filing this brief as *amicus curiae*.

Permission has been secured from all parties for the filing of this brief, and letters granting permission have been filed in the Clerk's office.

Statement of the Case.

On May 20, 1947, Lucky Stores, Incorporated, filed in the Superior Court of the State of California, in and for the County of Contra Costa, a verified complaint for injunction naming petitioners as defendants (R. 1). The petitioners demanded that the corporation "agree to hire Negro clerks, such hiring to be based upon the proportion of white and Negro customers patronizing its stores" (R. 4). Because of the refusal of respondent to comply with their demand, petitioners picketed "Lucky's" Canal Street Store in the City of Richmond, State of California. "Lucky" alleged that unless this picketing was restrained respondent would suffer irreparable damage and be forced to close the store in question and that such picketing was an infringement on its right to do business and required "Lucky" to violate a contract with a designated Clerk's

Union with which it had an exclusive collective bargaining contract.

On the same day, May 20, 1947, the Superior Court issued a temporary restraining order restraining, among other things, petitioners from picketing Lucky Stores for the purpose of compelling it to hire a number of Negro clerks proportionate to the number of Negro customers (R. 34).

On May 26, 1947, a hearing was had on an order to show cause and the matter was submitted to the judge of the respondent Superior Court. The Court determined that "Lucky" was entitled to a preliminary injunction, and on June 5, 1947, the trial court made and issued its formal order granting the preliminary injunction in substantially the same language as the temporary restraining order (R. 34).

On June 21, 1947, citations issued from the trial court to petitioners ordering them to show cause why they should not be punished for contempt for violating the preliminary injunction. On June 23, 1947 the Court found the two petitioners guilty of contempt and adjudged that they be imprisoned for two days and pay a fine of twenty dollars. A ten day stay of execution was granted (R. 35-36). On the same day—June 23, 1947—a petition for certiorari was filed in the District Court of Appeals, First District, Division One, State of California (R. 36), and the writ of certiorari was granted (R. 43).

On November 20, 1947, the District Court of Appeals, all three justices concurring, issued judgment holding that the preliminary injunction was beyond the jurisdiction of the trial court since it violated petitioners' constitutional rights and the judgment of contempt was annulled (R. 61).

Respondent Superior Court thereafter petitioned the Supreme Court of the State of California for hearing, and such petition was granted. On November 1, 1948, the Supreme Court of the State of California issued its opinion and made its decision that the judgment of contempt be affirmed. Four justices concurred in the majority opinion and two justices dissented (R. 90-111). Petitioners petitioned for a rehearing by the State Supreme Court, and on November 29, 1948, the petition for rehearing was denied, again with two justices dissenting (R. 111).

The Question Presented.

May Picketing to Secure Greater Economic Advantages for Negroes be Enjoined Because the Objective is Considered Illegal in the Absence of a Showing of a Clear and Present Danger of Substantive Harm Which the State is Entitled to Prohibit.

ARGUMENT.

I.

The action of the Court results in an unconstitutional suppression of free speech.

Freedom of speech and freedom of the press are among the indispensable characteristics of a democratic form of government and are rightly considered the most precious and cherished freedoms of our society, the *sine qua non* of our way of life. *Palko* v. *Connecticut*, 302 U. S. 319, 327; *Thomas* v. *Collins*, 323 U. S. 516. Since *Thornhill* v. *Alabama*, 310 U. S. 88, there has been no question but that peaceful picketing was an exercise of the right to freedom of speech and as such was secure against governmental

prohibition. Thus interference with petitioners' actions in this case was a violation of the guarantee of freedom of speech contained in the Fourteenth Amendment to the Federal Constitution.

Courts have no power to make a substantive examination of the pickets' purposes and decide, as a result of such examination, whether the picketing is permissible or must be restrained. See *Thornhill* v. *Alabama, supra; New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. Courts may merely determine whether the picketing is protected under the First or Fourteenth Amendments, not whether it is proper or meritorious. Almost without exception, as long as the picketing is peaceful, it is protected under the Constitution to the same extent as any other exercise of free speech. *Thornhill* v. *Alabama, supra; Carlson* v. *California*, 310 U. S. 106; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293. Even such cases as *Carpenters & Joiners Union* v. *Ritter Cafe*, 315 U. S. 722, held that peaceful picketing may not be prevented so long as the "sphere of communication" is "directly related to the dispute." No such question arises here. The picketing was at the premises directly involved in the dispute. Neither has any question been raised concerning the truth of the signs the pickets carried, nor whether the picketing was in fact peaceful which was the problem in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 316 U. S. 287.

The clear and present danger concept is the most palatable limitation upon freedom of speech. It has been variously defined. However, no matter what interpretation of the doctrine we employ, petitioners' actions were not such as to warrant the restriction herein imposed.

1. The record demonstrates that there was neither a clear nor present danger of public disturbance.

2. The Court did not even imply that there was either a clear or present danger of petitioners instituting hiring practices inimical of the public welfare.

3. Even if such legislation were constitutional, there was no legislative finding that petitioners were creating a substantive evil which the state has a right to prevent. Cf. *Dunne* v. *United States*, 138 F. (2d) 137, 145 (C. C. A. 8th, 1943).

Thus, whether the proscribed area be defined in any of the three ways described above or in any reasonable manner that comes to mind, petitioners' expressions still stand under the constitutional protection guaranteeing freedom of speech.

II.

Assuming that such a consideration were relevant, petitioners were not advocating an unlawful result.

The purposes for which the picketing was conducted were lawful. The picketing took place in the City of Richmond, County of Contra Costa, which has a Negro population of more than ten thousand. As elsewhere in the United States, employment opportunities for Negroes in Contra Costa are seriously circumscribed by tradition and prejudice, a situation which promises to become more acute in any possible economic recession which we may face in the future. Already, in Richmond, unemployment among the Negro population is greatly disproportionate to unemployment among the whites.

Petitioners, motivated by the quite understandable desire to improve their economic lot, undertook to picket, urging that respondent afford greater opportunity for em-

ployment to Negroes by abolishing discrimination based upon color in their hiring practices. They picketed, carrying signs which stated:

LUCKY WON'T HIRE NEGRO CLERKS IN PROPORTION TO NEGRO TRADE—DON'T PATRONIZE

The Court, interpreting "proportionate" as a mathematical word of art, concluded that petitioners were advocating employment of Negro clerks in strict ratio to whites, probably determined by a census of Richmond's growing and variable population. In *Cafeteria Employees' Union etc.* v. *Angelos, supra*, this Court adopted a more reasonable standard for interpreting the language of labor disputes. There it was stated:

> "To use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' . . . is not to falsify facts."

Petitioners' signs, seen against the background of facts, and in the light of this Court's standard of interpretation takes on a meaning more hortatory and less artificial, which was the meaning undoubtedly conveyed to those living in the context of the controversy. They were simply interested in increasing employment opportunities for Negroes and eliminating discrimination against them, something quite in accord with the public policy of the State of California, *James* v. *Marinship Corp.*, 25 Cal. (2d) 721, 155, p. 2(d) 329 (1944) and *Williams* v. *International etc. of Boilermakers*, 27 Cal. (2d) 586, 165 p. 2(d) 903 (1946), and of the United States, *New Negro Alliance* v. *Sanitary Grocery Company*, 303 U. S. 552.

The only objection to the picketing was the allegation that the pickets urged hiring of Negroes on a proportional

or quota basis and that such hiring would effect an inverse racial discrimination contrary to the policy of the State of California as determined in *James* v. *Marinship Corp., supra*. As stated at the outset, we, too, oppose a proportional or quota system of hiring and feel that persons must be given job opportunities in accordance with ability rather than in accordance with race or color. But the question is not whether petitioners' aims were good aims (granting that the Court's interpretation of the signs was correct), but whether the state's action was constitutional. Except for the quota or proportional aspects of the case, the factual situation is similar to that presented in *New Negro Alliance* v. *Sanitary Grocery Co., Inc., supra*, where this Court stated at page 561:

> "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable against workers on the ground of union affiliation."

III.

The cases upon which the Court relies are clearly distinguishable.

Both the *Marinship* case and the *Williams* case, upon which the Court relies, are clearly distinguishable. *James* v. *Marinship Corp., supra*, concerned a union which refused to admit Negroes and which also had a monopoly of jobs in a certain area. The Court held that a union with closed

shop prerogatives may not maintain a closed, discriminatory union. *Williams* v. *International etc. of Boilermakers, supra*, held similarly, however not limiting itself to the case of a monopoly of a geographical area. It held that a single closed shop was enough to justify the Court's intervention against discrimination. Secondly, neither the question of a closed shop nor a closed union is here involved. The Court, still assuming that the petitioners desire to introduce an arbitrary system of hiring, unrealistically analogizes the Negro race to a closed union. To compare a racial group desirous of acquiring a fair share of jobs available on a non-discriminatory basis, to an association organized for economic purposes and capable of including members of all races, ignores the fundamental social inequities which precipitated this dispute.

Conclusion.

Wherefore for the reasons herein above mentioned it is respectfully submitted that the judgment of the Supreme Court of California should be reversed.

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